Filed 8/9/10 Adrian A. v. Superior Court CA2/3

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

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| ADRIAN A., Jr.,<br><br>Petitioner,<br><br>v.<br><br>SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF LOS ANGELES,<br><br>Respondent,<br><br>LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES,<br><br>Real Party In Interest. | B223892<br><br>(Los Angeles County Super. Ct. No. CK75666) |

PETITION for extraordinary writ from an order of the Superior Court of Los Angeles County, Debra Losnick, Referee. Denied.

Law Offices of Katherine Anderson, Victoria Doherety and Lawren Cottles for Petitioner.

Andrea Sheridan Ordin, County Counsel, James M. Owens, Assistant County Counsel, and Sarah Vesecky, Deputy County Counsel, for Real Party in Interest.

Martha Mathews for Minors.

## INTRODUCTION

Adrian A., Sr. (father) petitions for an extraordinary writ overturning the juvenile court's order terminating family reunification services for father relating to two of his children, Adrian A., Jr. (Adrian) and Mireya A. (Mireya). We deny the petition.

## FACTUAL AND PROCEDURAL BACKGROUND

1. *Father's Family*

Prior to the commencement of this case, father was living in Los Angeles with Adrian and Adrian's mother, Pauline R. (mother). Father and mother were not married. Adrian was born in January 2008

In addition to Adrian and Mireya, father has two other children. Both of these children are in the custody of other people. Likewise, mother has two other children, both of whom are in the custody of a relative.

2. *Father's and Mother's Criminal History and History of Substance Abuse*

Prior to the commencement of this case, father was convicted of two felony counts of taking a vehicle without the owner's consent and of possession or purchase of cocaine base for sale. Father also had a history of substance abuse, including the use of cocaine. Mother, too, had a criminal history. She was convicted of burglary, theft of personal property, petty theft, and burglary second degree. Mother also had a history of substance abuse, including the use of methamphetamines.

3. *The Birth of Mireya and the Detention of Adrian and Mireya*

in December 2008, Mireya was born. This matter was referred to real party in interest Los Angeles County Department of Children and Family Services (DCFS) because at the time of Mireya's birth, mother had methamphetamines in her system.

Due to her premature birth, Mireya was admitted into the neonatal intensive care unit (NICU) at the Los Angeles County-USC hospital. Mother, however, showed limited interest in Mireya immediately following her birth and, after mother left the hospital, she did not regularly visit Mireya. Father, too, did not visit Mireya or make any effort to see her while she was in the NICU.

After the DCFS became involved in this matter on December 3, 2008, it attempted to locate Adrian. On December 10, 2008, a DCFS social worker spoke with mother over the telephone. Mother failed to disclose her whereabouts because she was concerned that the DCFS would remove Adrian from her care. The DCFS also attempted to contact father, but could not do so. Father's mother advised the DCFS that father was aware that DCFS was attempting to contact him, but father refused to communicate with the DCFS. The DCFS concluded that both father and mother were intentionally withholding information about their whereabouts in order to prevent Adrian from being taken into the custody of the DCFS.

4. *The Juvenile Dependency Petition*

On December 16, 2008, the DCFS filed a juvenile dependency petition. The petition alleged that Adrian and Mireya came within the jurisdiction of the juvenile court pursuant to Welfare and Institutions Code section 300,[1] subdivisions (b) (failure to protect), (g) (no provision for support), and (j) (abuse of sibling) based on, inter alia, mother's history of substance abuse and use of methamphetamines during pregnancy with Mireya; mother leaving Mireya at the hospital without making a plan for the child's ongoing care and supervision; father's failure to provide his children with basic necessities; and the fact that father's whereabouts were unknown.

5. *The January 22, 2009, Order*

On January 22, 2009, the juvenile court declared father the presumed father of Adrian and Mireya. The court also sustained the DCFS's dependency petition, as amended, with respect to Mireya, and provided father with family reunification services. Father was ordered to particulate in random drug testing, a parent education program, and individual counseling.

At the time of the January 22, 2009, hearing, father's whereabouts were still unknown. Mother was incarcerated and awaiting entry into a substance abuse treatment program.

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1 All future statutory references are to the Welfare and Institutions Code.

6. *The Incarceration of Father and Mother*

Upon mother's release from her incarceration, she reunited with father. In either late January or February 2009, father and mother were arrested for receiving stolen property. Adrian was with mother and father at the time they committed the crime and were arrested. Both mother and father were convicted and incarcerated. Father was sent to state prison in Chino. Adrian was taken into the custody of the DCFS.

7. *The Department's Efforts to Ascertain the Services Available to Father*

While father was in prison, he had periodic communications with the DCFS. On March 20, 2009, he had a telephone conversation with a DCFS social worker. On June 12, 2009, a DCFS social worker sent a letter to father requesting any information he had regarding his participation in court-ordered services. Although father did not respond to that request, he did send a least one letter to the DCFS asking for permission to attend court hearings.

On July 29, 2009, a DCFS social worker spoke with a "litigation counselor" at the state prison in Chino, and asked for a list of services offered to father and whether father was participating in such services. The litigation counselor stated that the social worker needed to make his request in writing. Within a week, the social worker did so. The litigation counselor responded by advising the social worker that the prison did not offer parent education, individual counseling, or random drug testing programs.

8. *The Father's Letter to the Court*

On August 18, 2009, father sent a letter to the juvenile court. In that letter, father stated: "I realize that I have made horrible choices in my addiction but I realize how important my children are and I will do whatever it takes to reunite with them." Mother made the exact same statement in a letter to the court dated June 23, 2009.

9. *The October 13, 2009, Order*

On October 13, 2009, the juvenile court sustained the DCFS's juvenile dependency petition, as amended, with respect to Adrian. The court also ordered family reunification services for father relating to Adrian. Father was ordered to attend individual counseling and to submit to drug testing.

10. *Father's Participation in Services While in Prison After the October 13, 2009, Order*

On January 6, 2010, father had a telephone conversation with a DCFS social worker. Father advised the social worker that he was taking a parenting class, and that this program was the only program offered to inmates. Father received a certificate of completion of a parenting education program on January 14, 2010.

Father was released from prison on March 17, 2010. After father's release, on April 13, 2010, a DCFS social worker contacted prison officials and asked about the programs they offered. The prison official stated that the prison offered parenting and anger management programs, as well as Narcotics Anonymous and Alcoholics Anonymous meetings. The prison official further stated that father only participated in the parenting counseling program.

11. *The Services Provided by DCFS after Father's Release From Prison*

On March 25, 2010, a week after father was released from prison, the DCFS provided father with a list of family reunification programs available to him, the addresses of the program providers, and two bags of transportation tokens to enable him to attend the programs. However, there is no evidence in the record that father participated in any of the programs offered to him.

12. *The Foster Parents' Care for the Children*

While father and mother were incarcerated, Adrian and Mireya were placed with foster parents. By July 2009, the children were "well bonded" with their foster parents. Further, the Adrian and Mireya were thriving in the their new home, and the foster parents stated that they were willing to adopt the children.

13. *The April 13, 2010, Order Terminating Family Reunification Services and Father's Petition Challenging That Order*

On April 13, 2010, the juvenile court held a status review hearing pursuant to section 366.21. The hearing was a section 366.21, subdivision (e) (6-month) hearing for Adrian and a section 366.21, subdivision (f) (12-month) hearing for Mireya.

At that hearing, the juvenile court terminated father's family reunification services and scheduled a permanent plan hearing pursuant to section 366.26. In so doing, the juvenile court stated that the conditions which necessitated the court's initial intervention still existed, and that father did not make significant or substantial progress in improving those conditions.

The court further found that reasonable services had been provided to father. In the reporter's transcript, the juvenile court did not expressly state the standard of proof it applied. However, in its minute order, the court stated that it made this finding under the preponderance of evidence standard.

14. *Father's Petition for an Extraordinary Writ*

On April 20, 2010, father filed a timely notice of intent to file a writ petition. Then, on June 14, 2010, father filed a petition for an extraordinary writ in this court challenging the juvenile court's April 13, 2010, order. On June 170, 2010, we issued an order to show cause, wherein we gave the DCFS an opportunity to file a response to father's petition, and directed the parties to appear for a hearing on the matter on July 14, 2010. On June 21, 2010, the DCFS filed an answer to the petition requesting that this court deny it. On July 1, 2010, Adrian and Mireya, through appointed counsel, filed a joinder of the DCFS's answer.

**CONTENTIONS**

Father challenges the juvenile court's April 13, 2010, order terminating family reunification services. His primary argument is that there was not substantial evidence to support the juvenile court's finding that reasonable family reunification services had been offered or provided to father. Although father does not specify what services he believes the DCFS should have offered or provided, he contends that he was "set up to fail" because he could not comply with the case plan while he was incarcerated. Father further argues that the DCFS failed to contact prison authorities to determine what services were available to father. Finally, father contends that the juvenile court erroneously applied the preponderance of evidence standard of proof, instead of the clear

and convincing evidence standard, in determining whether reasonable family reunification services were provided.

## DISCUSSION

1. *Standard of Review*

We review the juvenile court's finding that reasonable reunification services had been offered or provided under the substantial evidence standard of review. (*Mark N. v. Superior Court* (1998) 60 Cal.App.4th 996, 1010.) Under this standard, all reasonable inferences from the evidence must be made in favor of upholding the juvenile court's order. (*Ibid.*)

2. *Father Forfeited Most of His Arguments*

At no time prior to or during the April 13, 2010 hearing, did father argue that he was "set up to fail" by the juvenile court because he could not comply with the case plan while incarcerated. Nor did father argue in the juvenile court that the DCFS failed to contact prison authorities regarding the services available to father. He also did not argue in the juvenile court that the court applied the wrong standard of proof. Father thus forfeited all of these arguments on appeal. (*In re Kevin S.* (1996) 41 Cal.App.4th 882, 886; *In re Wilford J.* (2005) 131 Cal.App.4th 742, 754.)

At the April 13, 2010, hearing, father did not argue that the DCFS failed to provide reasonable reunification services. However, father's counsel stated: "Father is not in agreement with his reunification [services] being terminated. He was incarcerated up until March 17, 2010. He has just recently been released from incarceration." Father thus preserved the argument that the DCFS should have given him more reunification services because there was not much time between his release from prison on March 17, 2010, and the termination of his reunification services on April 13, 2010.

3. *There Was Substantial Evidence Supporting the Juvenile Court's Finding That Reasonable Reunification Services Were Offered or Provided to Father*

Assuming arguendo that father did not forfeit his arguments, we reject father's arguments on the merits. The DCFS is required to make a good faith effort to provide

reasonable reunification services to parents of dependent children that is responsive to the unique needs of each family. (*Mark N. v. Superior Court, supra,* 60 Cal.App.4th at p. 1010.) "The adequacy of the reunification plan and of the department's efforts to provide suitable services is judged according to the circumstances of the particular case." (*Id.* at p. 1011.) "With respect to an incarcerated parent, there is a statutory requirement that reunification services be provided 'unless the court determines, by clear and convincing evidence, those services would be detrimental to the minor.' (§ 361.5, subd. (e)(1).)" (*Ibid.*).

Reunification services for an incarcerated parent may include maintaining contact between the parent and child through collect telephone calls, transportation services, where appropriate, visitation services, where appropriate, and reasonable services to extended family members. (§ 361.5, subd. (e)(1).) "An incarcerated parent may be required to attend counseling, parenting classes, or vocational training programs as part of the reunification service plan if actual access to these services is provided." (*Ibid.*).

Reunification services " 'are voluntary, and cannot be forced on an unwilling or indifferent parent. [Citation.]' . . . 'The requirement that reunification services be made available to help a parent overcome those problems which led to the dependency of his or her minor children is not a requirement that a social worker take the parent by the hand and escort him or her to and through classes or counseling sessions. A parent whose children have been adjudged dependents of the juvenile court is on notice of the conduct requiring such state intervention. If such a parent in no way seeks to correct his or her own behavior or waits until the impetus of an impending court hearing to attempt to do so, the legislative purpose of providing safe and stable environments for children is not served by forcing the juvenile court to go "on hold" while the parent makes another stab at compliance.' " (*In re Christina L.* (1992) 3 Cal.App.4th 404, 414-415.)

Here, there was substantial evidence supporting the juvenile court's finding that reasonable services were provided or offered to father. Before his incarceration, father was offered reunification services with respect to Mireya. Father, however, did not take advantage of those services. Indeed, until he was incarcerated in about February 2009,

father intentionally avoided contact with the DCFS in an effort to keep the department from taking Adrian into its custody.

Likewise, during father's incarceration, the DCFS did all it could to provide father with services. Father admits that the only court-ordered service provided by the prison where he was incarcerated was parenting counseling. Father took that class.

Father contends that the DCFS failed to contact the prison to determine what services were available. This is simply not true. In August 2009, the DCFS exchanged correspondence with prison authorities regarding the available services. Further, in a telephone conversation with the DCFS in January 2010, father advised the DCFS that the only program available was a parenting class. In addition, after father was released from prison, the DCFS contacted the prison authorities and ascertained what services were available and what services father received. In any case, even if the DCFS had not contacted prison authorities regarding available services, father does not meet his burden of showing that he suffered any prejudice because he does not explain what additional services he could have obtained had the DCFS had more communications with prison authorities.

Father contends that he was "set up" to fail because he could not complete individual counseling and drug tests in prison, as the case reunification plan required. However, after father was released from prison, he had an opportunity to begin drug testing and individual counseling, but he did not do so. In addition, despite admitting to the court that he made "horrible choices" relating to his addiction to controlled substances, father did not take advantage of the prison's Narcotics Anonymous program while he was incarcerated. Although the reunification plan did not require father to participate in Narcotics Anonymous, his failure to do so supports the juvenile court's finding that the conditions which necessitated the court's initial intervention still existed.

Accordingly, by the April 13, 2010, hearing, there was substantial evidence to support the juvenile court's finding that reasonable services had been offered or provided to father. [2]

4. *The Juvenile Court Used the Correct Standard of Proof*

Father contends that the juvenile court erred in applying the wrong standard of proof in determining whether the DCFS provided reasonable services to father. We disagree.

The April 13, 2010, hearing was conducted pursuant to section 366.21, subdivisions (e) and (f). Section 366.21, subdivision (e) provides: "At the review hearing held six months after the initial dispositional hearing . . . the court shall order the return of the child to the physical custody of his or her parent or legal guardian unless the court finds, by a preponderance of the evidence, that the return of the child to his or her parent or legal guardian would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child. . . . [¶] . . . [¶] If the child is not returned to his or her parent or legal guardian, the court shall determine whether reasonable services that were designed to aid the parent or legal guardian in overcoming the problems that led to the initial removal and the continued custody of the child have been provided or offered to the parent or legal guardian. The court shall order that those services be initiated, continued, or terminated." Similarly, section 366.21, subdivision (f) provides that a hearing held pursuant to that subdivision, the court shall "determine whether reasonable services that were designed to aid the parent or legal guardian to overcome the problems that led to the initial removal and continued custody of the child have been provided or offered to the parent or legal guardian."

Thus, in the context of a hearing held pursuant to section 366.21, subdivisions (e) and (f), the statute does not specify the standard of proof the juvenile court must apply when determining whether reasonable services were provided. (See *In re Misako R.*

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[2] We recognize that father did not have much time to begin individual counseling and drug testing after he was released from prison. However, under the totality of circumstances, we hold that there was substantial evidence to support the juvenile court's finding that reasonable services were offered or provided to father.

(1991) 2 Cal.App.4th 538, 547-548 [reviewing former section 366.21, subdivision (f)].) "Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence." (Evid. Code, § 115.) Accordingly, the standard of proof at a section 366.21, subdivision (e) or section 366.21, subdivision (f) hearing regarding whether the DCFS provided reasonable services is the preponderance of evidence standard. (*In re Misako R.*, at p. 547-548.)

Father's reliance on *In re Monica C.* (1995) 31 Cal.App.4th 296 is unpersuasive. There, the court held that "[former] section 366.21, subdivision (g)(3), requires 'clear and convincing evidence' that [reasonable reunification] services have been offered to the parents." (*In re Monica C.*, at p. 306.) However, unlike section 366.21, subdivisions (e) and (f), former section 366.21, subdivision (g) expressly provided for a "clear and convincing" standard of proof. *In re Monica C.* thus is distinguishable from this case.

It is also important to note that the current version of section 366.21, subdivision (g) provides: "If the time period in which the court-ordered services were provided has met or exceeded the time period set forth in subparagraph (A), (B), or (C) of paragraph (1) of subdivision (a) of Section 361.5, as appropriate, and a child is not returned to the custody of a parent or legal guardian at the permanency hearing held pursuant to subdivision (f), the court shall do one of the following: [¶] . . . [¶] (2) Order that a hearing be held within 120 days, pursuant to Section 366.26, but only if the court does not continue the case to the permanency planning review hearing and there is *clear and convincing evidence* that reasonable services have been provided or offered to the parents or legal guardians." (Italics added.) Hence, the statute expressly provides that the standard of proof at a section 366.21, subdivision (g) hearing is "clear and convincing" evidence. The absence of a similar express provision in section 366.21, subdivision (e) and section 366.21, subdivision (f), indicates that the Legislature did not intend to require the same standard of proof at a hearing pursuant to those subdivisions. (Cf. *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2009) 173 Cal.App.4th 13, 28 [applying maxim *expressio unius est exclusio alterius*]; *Strang v. Cabrol* (1984) 37 Cal.3d 720, 725 [same].)

In this case, as stated, the April 13, 2010, hearing was held pursuant to section 366.21, subdivisions (e) and (f). Accordingly, the standard of proof was a preponderance of evidence. The juvenile court applied the correct standard.

Moreover, even assuming the juvenile court applied the wrong standard of proof, father failed to meet his burden to show that the error was prejudicial, that is, resulted in a miscarriage of justice. We thus cannot reverse the April 13, 2010, order based on the juvenile court's alleged failure to apply the correct standard of proof. (Cal. Const., art. VI, § 13 [no judgment shall be set aside unless it would result in a miscarriage of justice].)

**DISPOSITION**

The petition is denied.

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KITCHING, J.

We concur:

KLEIN, P. J.

CROSKEY, J.